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THE UNCERTAIN MARKERS OF THE TRANSITION FROM THE INFORMAL TO THE FORMAL ECONOMY

RÉSUMÉ

Cette contribution propose de revenir sur les réflexions qui ont progressivement conduit l'OIT à s'intéresser à la question du travail dans l'économie informelle. Elle interroge, sous un angle juridique, les définitions qui ont été proposées de ce phénomène, jusqu'à l'adoption de la Recommandation n°204.

Mots clés : *Economie informelle, Transition, Définitions, Organisation internationale du travail, travail décent*

ABSTRACT

This contribution proposes to return to the reflections that have gradually led the ILO to focus on the issue of work in the informal economy. It questions, from a legal point of view, the definitions of this phenomenon that have been proposed, until the adoption of Recommendation No. 204

Keywords: *Informal Economy, Transition, Definitions, International Labour Organization, Decent Work*

The notion of an “informal” sector or economy has been used since the middle of the last century especially to describe the parts of the third world’s economy consisting of activities, establishments and jobs that do not meet the rules in force and are therefore excluded from the national accounts and statistics. The awakening to this reality, which concerns the majority of the world’s population, has been somewhat belated. For a long time, it was considered that this aspect of “underdevelopment” could be explained by weak industrialization and that the economic growth generated by investment in “modern” activities would eventually absorb the surplus labour force, extend the “formal” economy and lead to social inclusion. Beyond their internal ideological differences, the development theories had in common the centrality of work and the correlation between industrial progress and economic and social development. The substitution of the expression “developing countries” for “underdeveloped countries” translates this promise of historic transition to a model of industry proclaimed by the ILO in its constitution and more strongly, with regard to the third world, in the Philadelphia Declaration.¹

The relevance of the work done on the “informal sector” and its impact on the social partners, in particular within the ILO, has spread to other disciplines, giving rise to a rich terminology evoking, through multiple images, how establishments and activities recognized as “informal”, “peripheral”, “under-integrated”, “non-structured” or “atypical” vary from the standard model. In addition to these qualifications whose success depended on the revelatory force of the departures from the dominant characteristics of the activity concerned, numerous other terms are used, in particular with regard to development, to emphasize the “marginal”, “uncontrolled”, “spontaneous”, “anarchic” and even illegal nature of the human establishments concerned². What they have in common is that they all suggest an economic duality that is destined to disappear under the effect of integration into the sphere that meets the official or recognized norms and standards.

- 1 Among the critical writings of the period on this subject, see S. Amin, *L'accumulation à l'échelle mondiale, critique de la théorie du sous-développement*, Anthropos, IFAN, Dakar, 1970; by the same author, *Impérialisme et sous-développement*, Anthropos, 1976; B. Bairoch, *Révolution industrielle et sous-développement*, SEDES, Paris, 1963; A.G. Frank, *Le développement du sous-développement, l'Amérique Latine*, Ed. Mspero 1977. More generally, on the hegemony of the industrial organization over social and political thinking, cf. the analyses of Bruno Trentin, *La cité du travail, le fordisme et la gauche*, Preface by Jacques Delors and Introduction by Alain Supiot, Fayard, Poids et mesures du Monde, 2012; Also, Pierre Musso, *Monastère, manufacture, usine, Une généalogie de l'entreprise*, Fayard, Poids et mesures du monde, 2017
- 2 Cf. by way of example, Durand-Lasserre, Auger and Venetier, «Croissance périphérique des villes, cas de Bangkok et de Brazzaville», CEGET, Coll. travaux et documents de géographie tropicale, Bordeaux, 1974; Hugon Nhu Le Abadie, A. Morice, «Le secteur informel de la petite production marchande : le cas africain»; IEDES, Paris 1977; A. Quijano, «La formation d'un univers marginal dans les villes d'Amérique Latine», *Espaces et Sociétés*, July 1971; A. Vernière, «A propos de la marginalité: réflexions illustrées par quelques enquêtes en milieu urbain et suburbain africain», *Cahiers d'études africains*, vol. XIII, no. 3 Paris, 1973; J. Bougnicourt, «Economie infra-urbaine et marginaux, quelques éléments pour une controverse», IDEP, Dakar 1973; A. Coing, «Pauvreté urbaine et secteur informel», Seminario nacional sobre «Pobreza urbana e desenvolviento», Universidad Federal de Pernambuco, Recife, déc. 1979; CEGET-CNRS, «La croissance périphérique des villes du tiers-monde», Bordeaux 1980; C. Moser, «Informal sector or petty commodity production: Dualism or dependence in urban development?», *World development*, vol. VI, no. 9, Oct-Dec. 1977; R. Filali Meknassi, «La marginalité du travailleur en droit social, constat et proposition d'analyse», *Droit et environnement social au Maghreb*, CNRS and Fondation du Roi A Saoud, Casablanca 1989.

Jurists largely remained on the fringes of these doctrinal and policy debates aroused by the application of positive law, until ILO Recommendation 204 on the Transition from the Informal to the Formal Economy brought the issue into the realm of international labour standards (I). It appears, however, that if this instrument is inspired by a rights-based approach and consolidates the objective of decent work, the elements driving the transition that it recommends remain as unclear as the boundary between the formal economy and the informal economy (II).

I - THE INTEGRATION OF THE INFORMAL ECONOMY INTO THE NORMATIVE SPHERE

One of the numerous reasons explaining the lack of interest taken by jurists until now in the question of the informal economy, is surely the prevalence of the normative approach in the science of law. For this discipline, the main function of the law is to produce the standards that will govern social relations and analyse the compliance of acts and events with their terms. Legal rules are declared applicable when the conditions for which they provide are met, leaving aside the aptitude of the people concerned to ensure their fulfilment. Their wording is blind to the diversity of social reality and obstinately claims to give them a common normative backing. The legal analysis confines itself to the content of the rule and is intended to be applied regardless of the social effect that it produces. This is essentially encapsulated in contentious proceedings, whose aim is to sanction the misdemeanours people commit against the law in force. On the other hand, the approach in terms of the informal economy is focused on the conduct of the activities and their integration into the model of the economy as represented in the national statistics and national accounts. Although the two disciplines may share the relationship to reference standards, the approaches and their purposes are antagonistic. The observation of the living law goes beyond the legal sphere to become a matter for sociology. Now legal sociology only became relatively widespread in the 1970s and remains a field that is largely alien to “dogmatic” jurists. It is barely present in university courses and totally absent from teaching in the countries of the southern hemisphere, where the informal economy, employment and habitats prevail.

A second factor of confusion between the two approaches is to be found in normative pluralism. The distinction between the formal economy and the informal economy rests on the compliance with absolute doctrinal or professional criteria, whereas the analysis of legal compliance always refers to given acts, events and institutions and calls upon a normative pluralism and relativism in the qualifications used. The non-compliance of a job, establishment or activity with the criteria of the formal economy does not mean that it is illegal, even when it is appreciated on the basis of criteria identical to those used in economics. Conversely, establishments that are at the centre of the formal economy may be totally or partially deprived of legal recognition.

The jurist’s job consists first of all in interpreting the standard and qualifying the acts and events that arise accordingly. When he observes that there is too great a gap between the standard and social practice, he abandons the legal terminology in favour of concepts such as normative ineffectiveness or legal marginality to emphasize that the law is still intended to apply in the same way and that the facts resist its penetration. The principles of legality and equality between subjects of law oblige it to treat in the same way all situations to

which the same rules apply. The existence of a socio-economic space qualified as informal cannot alter this attitude, even if it is defined by borrowing from the legal rules.

Another reason for jurists' suspicion of the concept of economic informality is the tendency to associate informality with illegality, which results in the conflation of unregulated activities, those which constitute trafficking and those that do meet, totally or partially, the administrative, accounting or tax standards. And yet Recommendation 204 on the Transition from the Informal to the Formal Economy seems to achieve the feat of establishing a connection, and even an assimilation, between the informal economy and decent work, which would lead to an obligation to bridge this gap by the transition to decent work, which is presumed to represent compliance with standards.

The first advantage of the approach is to refocus the ILO's actions on the effort it has imposed upon itself since 1990 to concentrate its priorities and actions on the field of decent work, as reflected through four strategic objectives put forward by the Director-General to restructure the organization's work,³ and solemnly confirmed in 2008 by the Declaration on Social Justice for a Fair Globalization.⁴

The second advantage ensues from the impact of the human rights-centred approach⁵ on the activities of all the international organizations. We can see early signs of this in the 1998 Declaration on Fundamental Principles and Rights at Work, an explicit confirmation in the Decent Work report of 1990⁶ and what could be considered the culmination of the trend in the inclusion of decent work in the Sustainable Development Goals for 2030.⁷

Within the meaning of Recommendation 204, the informal economy covers economic activities and workers who are not covered or insufficiently covered in law or in practice by the standards in force.⁸ In the exhaustive list that it contains, it includes enterprises, entrepreneurs, employers, own-account workers, salaried employees and family workers, paid or unpaid, working in both formal and informal units in the private and public sectors, in particular those in subcontracting, working in the social economy or households, as long as they are engaged in an economic activity.

The Recommendation's aims are to:

- prevent the informalization of formal economy jobs;

3 Cf. BIT, Decent Work, Report of the Director-General at the International Labour Conference, 8th session, 1999

4 Adopted by the International Labour Conference on 10 June 2008, at its 90th session

5 Cf. in particular, "The Human Rights based approach and the United Nations system", UNESCO, *UNESCO Strategy on Human Rights*, Desk study prepared by André Frankovits, 2006.

6 *Ibid*, "The programme priorities. Human rights and work", p 14.

7 Its formulation having been expressed in different terms which place more emphasis on the link between economic growth and full and productive employment in Goal 8: Promote "sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all".

8 However, this definition excludes illegal activities such as the provision of services or the production, sale, possession or use of goods forbidden by law, including the illicit production and trafficking of drugs, the illicit manufacturing of and trafficking in firearms, trafficking in persons, and money laundering.

- facilitate the transition of workers and economic units from the informal to the formal economy (...);
- promote the creation, preservation and sustainability of enterprises and decent jobs in the formal economy and the coherence of macroeconomic, employment, social protection and other social policies.

The criterion used to define the informal economy is therefore the lack of protection provided in law or in practice to workers by the standards in force, a situation which calls for action by the public authorities, in favour at once of the inclusion in the normative field of workers who are excluded from it, the reinforcement of the effectiveness of the standards when in practice they are not adhered to and the improvement of the quality of protection they organise.

It is, however, up to States to give effect to these prescriptions taking due account of the "diversity of the informal economy". The competent authority should identify the nature and extent of the informal economy as described in this Recommendation, and its relationship to the formal economy. To this end, it should "make use of tripartite mechanisms with the full participation of the most representative employers' and workers' organizations, which should include in their rank, according to national practice, representatives of membership-based representative organizations of workers and economic units in the informal economy".

The informal economy thus seems to abandon the technical criteria used by statisticians in the evaluation of employment and establishments considered as informal and to which the Organization has nevertheless stated its attachment.

II - THE INDETERMINATION OF THE TRANSITION FROM THE INFORMAL TO THE FORMAL ECONOMY

The main purpose of the usual criteria applied to the informal economy is to identify its components and evaluate its content. After a process of study and consultation, the international association of labour statisticians arrived at an approach which, however debatable it may be, is universally used to produce national statistical data on this subject and necessarily impacts the analyses that rely on it. The ILO's earlier work and resolutions widely refer to it and they have clearly left their imprint on the Recommendation. But the latter's focus on compliance with the standards confirms a profound break with their objective and substance, giving way to some profoundly different concepts.

As early as the 1960s, when the industrialized countries still were still in need of large numbers of immigrants to meet demand for labour, it was established that unemployment remained very high in most southern regions and that the evolution of their economies in no way indicated that it was likely to be reduced in line with economic growth. The question of employment then rose to the top of the list of development goals, opening the way to numerous international and regional conferences on the issue.⁹ The World

9 Cf. in particular the Ottawa Plan for human resources development adopted by the Seventh Conference of the American States Members of the ILO (1966); the Asian Manpower Plan which was based on the recommendations made in Singapore in 1966 at the 13th Asian Advisory Committee session and developed at the Sixth Asian Regional Conference in Tokyo in 1968; as well as the Jobs and Skills Programme for Africa, initiated by the Conference at the 3rd session of the African Advisory Committee in Dakar in 1967.

Employment Programme, adopted by the ILO on its 50th anniversary, reflects this by stating that “any international development strategy must make a place among its objectives for the expansion of employment and include both national and international measures to this end”¹⁰. The initiative was tied in with the “International Development Strategy for the Second United Nations Development Decade” adopted by the UN in the same year. The world programme subsequently developed contributed decisively to challenging the belief, commonly held until then, that today’s investments represent the jobs of tomorrow and the income of the day after tomorrow, thereby gradually eliminating unemployment, poverty and inequality.

The weight of the demographic factors, as well as the far more complex links between the different factors relating to production and growth, required a change in approach, on both a conceptual and a political level, in order to make employment a central goal and no longer a derivative of economic growth and even less so of an economy perceived only through its formalized structures.

It was against this background that the scale of informal activities and their territorial presence expressed in terms of unstructured, atypical or informal sectors or zones emerged. In particular, the ILO’s report on Kenya (1972), which was based on a long series of investigations, established that the low rate of job creation in the so-called modern economy did not necessarily lead to an untenable increase in unemployment. Other studies conducted in different contexts used similar observations to challenge the apparent structural duality of the southern economies. In particular they have shown that informal employment constitutes a pool of labour for the formal job market, that it contributes to the reproduction of workers in the structured economy by offering goods and services at reduced cost and that there are extensive bridges connecting it to formal activities.

The combination of this political and research work conducted within the ILO led first of all to a better understanding of the complexity of the question of non-industrial employment, then to the establishment of the informal sector as a major category in the employment structures of the southern countries.

However, the fear of encouraging operators to set up in the informal economy remained strong among governments and social partners. This was expressed in the following terms in the 1991 Report of the Director-General: “There can be no question of the ILO helping to promote or develop an informal sector as a convenient, low-cost way of creating employment unless there is at the same time an equal determination to eliminate progressively the worst aspects of exploitation and inhuman working conditions in the sector”.¹¹

For a long time, meetings of employment statisticians and the data produced by countries reflected deep divisions by producing empirical definitions that combined in particular the status in a profession, size of the enterprise, its non-registration, low income level and the failure to keep accounts. But the needs of the World Employment Programme accelerated the adoption of an international definition enabling the development of the informal sector to be measured and monitored. The 14th International Conference of Labour Statisticians, held in 1987, took up the issue, with as its first priority, the need to

10 Report of the Director-General, ILO, World Employment Programme, Geneva 1969.

11 ILO, “The Dilemma of the Informal Sector”, Report of the Director-General, 1991, p 58.

break away from the image of illegality and an underground or hidden nature generally attached to informal employment. It therefore had to be acknowledged once and for all that informal working is not a result of the desire of those engaging it to evade the law, but rather of the inability of the public authorities to impose compliance with their own rules, in some cases due to a lack of political will, but most often because of their maladjustment to economic, social and cultural realities.

The Conference's second concern was to remove agricultural work from the definition of the informal sector, with which it shares many characteristics, although this risks ignoring its specific nature compared to the formal employment market. The definition agreed is intended to be operational and to exclude agriculture: the informal sector is described as "production units which form part, within the system of national accounts, of the household sector as unincorporated enterprises owned by households".

The weak separation of the status of the establishment/activity with the household constitutes the key element in the definition. It is implicitly correlated with the lack of accounts, which would challenge the confusion between the work unit and the assets of its owner. On the other hand, neither the place where the work takes place, nor its duration, nor its primary or secondary nature nor the income it produces are decisive elements in the definition of units considered as being in the informal sector. The two main types of enterprises making up the sector are:

- the establishments of own-account workers employing family members and possibly casual workers;
- the enterprises of unregistered "informal employers" employing a small number of stable workers, who are themselves unregistered.

By characterizing the "informal sector" through its close relationship with the household, the definition allows it to be recorded in the national accounts as a component of the institutional sector "households". This avoids fuelling the theory of structural duality, but also focusing on the sector thus constituted rather than on informal "employment". The criteria refer to the characteristics of the economic unit and not to the condition of the worker.

Three types of work units are identified according to whether or not they use family workers, workers employed on an occasional basis or regular, but unregistered workers:

- own-account workers, which covers units operating without the assistance of family workers or employees on an occasional basis;
- self-employment, including the contribution of family workers and occasional employees;
- micro-enterprises which have very small numbers of "regular" or "formal" employees.

Addressed in this way for the purposes of statistical evaluation, the approach has been integrated into the usual methods of surveying the economically active population, giving primacy to the unit of production of goods and services rather than to the workers assigned to it. Social protection has no place here.

Other work done on related concepts such as "inadequate work", "underemployment", "home working", "self-employment" or "outsourced jobs" has confirmed that the realities that they describe cannot be reduced to the distinction between the formal and informal "sectors", even though they can serve as indicators of the precariousness of employment

and insufficient social protection attached mainly to the condition of workers in the informal sector.

The report of the ILO Committee on Employment and Social Policy, dated March 2000, appropriated the definition enshrined in the ICLS Resolution of 1993, pointing out that “the ILO’s own research and surveys and the International Conference of Labour Statisticians (ICLS) have contributed substantially to reaching a widely-accepted statistical definition of the informal sector”.¹²

It goes on to say “the term “informal sector” has been used widely to refer to that segment of the labour market in developing countries which has absorbed significant numbers of jobseekers and unemployed workers, mostly in self-employment and in very small production units. But it is already observed that “decentralized production and labour processes” have been made possible by new technologies, generating subcontracting to “household-based production units and homeworkers in the informal sector. This is happening in advanced and developing countries”.¹³

The document recommends an integrated approach for the future, recalling the terms of the 1990 report in which the Director-General proposed that the focus for the ILO be “workers beyond the formal labour market”, not solely workers employed in informal production units. The link with the goal of decent work is clearly established: “Protecting jobs while achieving decent work for workers beyond the formal labour market calls for a multidimensional and integrated approach, as past experience has shown – one which addresses factors and issues at the global, macro-, meso- and microeconomic levels, and which combines policy and legal instruments. Most importantly, such an approach should differentiate between the multiple segments and facets of the informal labour market”.¹⁴

The document is full of terminology with comments serving as technical definitions not only of the informal economy but also of various related concepts.¹⁵ La notion refers to

12 Note 2, p.1 reads “The statistical definition of the informal sector used by the International Conference of Labour Statisticians (ICLS) is: “a group of production units which ... form part of the household sector as household enterprises or, equivalently, unincorporated enterprises owned by households”, and which comprises of informal own-account enterprises owned and operated by “own-account workers, alone or with members of the same or other households and which do not employ employees on continuous basis, and of enterprises of informal employers which employ one or more employees on continuous basis” (resolution adopted by the 15th ICLS, Jan. 1993.)

13 *Idem*, p. 3.

14 ILO, Employment and social protection in the informal sector, 2000: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb277/pdf/esp-1-2.pdf>.

15 The document adds the following terminological clarifications, citing for each definition the internal source in the work of the International Conference of Labour Statisticians: (b) Informal sector: A group of production units comprised of unincorporated enterprises owned by households, including informal own-account enterprises and enterprises of informal employers (based on 15th ICLS); (c) Informal sector enterprises: unregistered and/or small-scale private unincorporated enterprises engaged in non-agricultural activities with at least some of the goods or services produced for sale or barter (based on 15th ICLS); (d) Employment in the informal sector: All jobs in informal sector enterprises (c), or all persons who were employed in at least one informal sector enterprise, irrespective of their status in employment and whether it was their main or a secondary job (based on 15th ICLS); (e) Informal wage employment: all employee jobs characterized by an employment relationship that is not subject to national labour legislation, income taxation, social protection or entitlement to certain employment benefits (based on 17th ICLS); (f) Informal employment: total

"all economic activities by workers and economic units that are - in law or in practice - not covered or insufficiently covered by formal arrangements". This compares with the report submitted to the International Labour Conference in 2002.¹⁶

If we replace the term "formal arrangements" with the expression "standards", we find that we are easily within the scope of the definition of the informal economy used by Recommendation 204. However, if in the first case, reference is manifestly made to the rules that govern economic establishments, in the second case, the reference is rather to labour and social protection standards, which inevitably leads to problems of identification or qualification.

The shift from the field of economic units to that of workers working in economic units who are insufficiently covered by the laws in force makes it possible to align the scope of the informal economy with that of the absence of normative protection in law or in practice, which is some way from the aforementioned approach. The centrality of the question of employment finds itself ranked alongside other normative issues, all relating to the field of governance and tripartite dialogue: "To increase job quantity and quality, emphasis should be placed on investing in people, especially the most vulnerable - in their education, skills training, lifelong learning, health and safety - and encouraging their entrepreneurial initiative. Poverty reduction strategies, in particular the Poverty Reduction Strategy Papers (PRSPs), should specifically address the problems in the informal economy. The creation of decent jobs should be a measure of success for these strategies. In many developing countries, rural development and agricultural policies, including supportive legal frameworks for cooperatives, need to be enhanced and strengthened. Special attention should be given to the care responsibilities of women to enable them to make the transition from informal to formal employment more easily".

The analyst will doubtless find no definition of the "standards" that have to be met for an activity to be classed as part of the formal economy. Are these the fundamental rights defined in the Declaration of 1998? Are they the international labour standards as a whole, bearing in mind that adherence to the latter is optional and that most of them are only intended to apply to employees working in structured units, even though the

number of informal jobs, whether carried out in formal sector. Among the indications it provides enterprises, informal sector enterprises, or households; including employees holding informal jobs (e); employers and own-account workers employed in their own informal sector enterprises; members of informal producers' cooperatives; contributing family workers in formal or informal sector enterprises; and own-account workers engaged in the production of goods for own end use by their household (based on 17th ICLS); (g) Sum of employment in the informal sector(d) and informal employment (f) outside the informal sector; the term was not endorsed by the 17th ICLS.

- 16 The 2002 International Labour Conference report on the Decent work and the informal economy points out that "there is no universally accurate or accepted definition" of the "informal economy", but "there is a broad understanding that the term... accommodates considerable diversity in terms of workers, enterprises and entrepreneurs with identifiable characteristics. They experience specific disadvantages and problems that vary in intensity across national, rural and urban contexts".
- It adds that the expression "informal economy is preferable to "informal sector" because the workers and enterprises in question do not fall within any one sector of economic activity, but cut across many sectors. It refers to all the economic activities of workers and economic units that remain, in law or in practice, outside the arrangements in force. It accepts that its contours remain relatively imprecise and that it tends to downplay the linkages, grey areas and interdependencies that exist between formal and informal activities.

precise aim is decent work for the majority of workers who, most often, are not covered by these standards? Are they the national standards, in which case their reduction would also constitute a means of inclusion in the formal economy? Are they some intangible superior standards, the concept of decent work not constituting a normative basis in itself, but a social development goal linked to the promotion of employment and the expansion of social protection in the wider sense that the SDGs link to economic growth?

The answers are surely not to be found in the Preamble to the Recommendation which refers at once to decent working conditions, inclusive development, the Declaration of Philadelphia and the Universal Declaration of Human Rights. For their part, the recommendations contained in the nine Parts of the Recommendation¹⁷ as well as the reference in the Annex to most of the currently applicable international labour standards and the instruments of the United Nations relating to human rights constitute a kit or guide to good practice for development purposes, while most of the resources have long been recommended and have been undermined by globalization in a context of a general lack of international public governance and the overwhelming power of finance.

On the one hand, a statistical definition of the informal economy fails to provide a convincing image, by excluding agricultural workers who actually constitute the world's most vulnerable population, and by including economic units that do not keep accounts. On the other hand, the Recommendation juxtaposes a definition based on the existence of and adherence to an undefined set of "standards". The jurist concerned with normative rigour will not find either in the first definition or in the provisions of the Recommendation the points of reference needed for an operational definition of the informal economy and even less so the arguments to designate the tools of the transition to a formal economy that constitutes the better side of the same coin.

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